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Nos. 81-2147 and 81-2188

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF ARIZONA, ET AL., PETITIONERS

v.

SAN CARLOS APACHE TRIBE OF ARIZONA, ET AL.

STATE OF MONTANA, ET AL., PETITIONERS

v.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONSE OF THE UNITED STATES TO MOTION FOR LEAVE TO FILE AND MOTION TO DISMISS FOR LACK OF JURISDICTION

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1. Needless to say, on the ground of gross untimeliness alone, the attempt of the two moving Tribes to intervene in these cases at this eleventh hour appropriately might be denied. One of them, the White Mountain Apache Tribe of Arizona, pointedly refused to press its water claims in any court, and, accordingly, has never been a party here, directly or indirectly. See *White Mountain Apache Tribe* v.

Smith & Watt, petition for cert. pending, No. 81-2334. The other, the Blackfeet Tribe of Montana, was content, until the eve of oral argument in this Court, to be represented by the United States. But, even though not separate parties, either Tribe could have sought leave to file a timely brief *amicus curiae* in this Court.

Nevertheless, we interpose no objection to the Court's consideration of the "Motion to Dismiss" on its merits. It may be that the resolution of the pending cases will be assisted by taking into account the proposed submission.

2. We cannot support the so-called "Motion to Dismiss," as framed. Indeed, we do not appreciate how this Court properly could take any action with respect to the "State court water rights adjudication proceedings" which are not here for review. The Court has before it only the several judgments of the United States Court of Appeals for the Ninth Circuit and, obviously, the decision rendered here must be directed to that court, not the State courts of Arizona or Montana.

To be sure, if this Court affirms the court below insofar as it directed the federal district courts to proceed to adjudicate the Indian water rights, it would follow that the State proceedings, to that extent, should be dismissed or stayed. But this Court need enter no such order. We take it for granted that, once the Court has made its decision, the State courts will abide the result.

More fundamentally, however, we agree with Movants that this Court ought not approve the dismissal of the federal court action unless it first concludes that the Indian water rights can be adjudicated in the pending State court proceedings in Arizona and Montana. Other objections aside, the indispensable condition is that the State proceedings qualify as "general stream adjudications" as to which the sovereign immunity of the United States has been

waived by the McCarran Amendment, 43 U.S.C. 666. This is, of course, the basic premise of the *Akin* rule of "wise judicial administration." *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 817-820 (1976).

3. The federal district court in the Arizona cases concluded, albeit without elaboration, that the State court proceedings satisfied the conditions of the McCarran Amendment. 81-2147 Pet. App. E8, E13. The district court in Montana took the same view of the State court proceedings involved there, again with little more than a conclusory statement. 81-2188 Pet. App. 60-61. The court of appeals, reversing on other grounds, did not resolve the question in any of the cases. 81-2147 Pet. App. A9-A11, B3-B4; 81-2188 Pet. App. 41-45.[1] For our part, as Movants point out (Motion 4), we have asserted that the proceedings pending in the Arizona and Montana courts qualify as general stream adjudications for the purpose of the McCarran Amendment. See U.S. Br. 33 n.23.

Our concession was compelled, we believed, by this Court's rejection of the arguments tendered in *United States* v. *District Court for Eagle County*, 401 U.S. 520, 525-526 (1971), and *United States* v. *District Court for Water Division No. 5*, 401 U.S. 527, 529-530 (1971). See U.S. Br. 30-31. Nothing in the present Motion leads us to a different conclusion. We cannot fault the Arizona courts for excluding from the pending proceedings, at least preliminarily, waters already adjudicated by other courts—notably the rights determined by a State court succeeding the Territorial court in *Hurley* v. *Abbott*, No. 4564 (D.

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[1] In the Montana cases, the court below recited the arguments made, on the one side, that the federal proceedings were "piecemeal," and, on the other, that the State proceedings lacked "comprehensiveness." 81-2188 Pet. App. 41-42. But we find no indication that the court resolved the issue.

Ariz. Mar. 1, 1910) (the so-called "Kent Decree"),[2] and those determined by the federal district court in *United States* v. *Gila River Irrigation District*, No. E-59-Globe (D. Ariz. June 29, 1935) (often called the "Globe Equity Decree"), referred to in *Arizona* v. *California*, 376 U.S. 340, 348-350 (1964)).[3] A fortiori, there can be no complaint that Arizona has not presumed to assert jurisdiction over Indian water rights within the upper Santa Cruz River basin (see Motion 6, 10), which Congress effectively has settled. See Act of Oct. 12, 1982, Pub. L. No. 97-293, Sections 301-315, 96 Stat. 1274-1285.[4] Nor do we appreciate in what respect Movants find the Montana State court proceedings lacking in comprehensiveness. See Motion 6-8, 10-11.

On the other hand, although the sufficiency of the State court proceedings has been challenged by some of the parties (see, *e.g.*, Brief of San Carlos Apache Indian Tribe 79-95), it is right to say that the question has not been fully briefed in this Court and that the opinions below offer little

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[2]The "Kent Decree" is reprinted in *Indian Water Rights of the Five Central Tribes of Arizona: Hearings Before the Senate Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. 149-226 (1975).

[3]The exact scope of the *Kent* and *Globe Equity* decrees is disputed and we do not intend here to suggest any view on that question. What is more, we are advised that interested parties recently have sought to expand the new State court proceedings to embrace the areas covered by those decrees.

[4]The reference to *United States and Papago Indian Tribe* v. *City of Tucson*, No. 75-39 TUC (JAW), as a case "pending in the United States District Court for the District of Arizona" (Motion 6) is misleading. The legislation referred to expressly provides for dismissal of that action, and it is anticipated that this will occur. See Pub. L. No. 97-293, Sections 307(a)(1)(C) and (2), 96 Stat. 1281, 1282. Moreover, as we are advised, the *res* of that litigation is mainly groundwater, not the waters of "a major tributary of the Gila River," as represented by Movants. See Motion 6.

assistance on the issue. Of course, "[i]f there is any substantial doubt" as to whether "the parallel State-court litigation will be an adequate vehicle for the complete and prompt resolution of the issues between the parties," "it would be a serious abuse of discretion" for the federal court to dismiss the case filed there. *Moses H. Cone Hospital* v. *Mercury Construction Corp.*, No. 81-1203 (Feb. 23, 1983), slip op. 25. Accordingly, it is arguable that the question should be remitted to the court of appeals if this Court deems it dispositive.

We add only that, under our submission, a federal court whose jurisdiction is timely invoked for the purpose of quantifying Indian water rights ought to proceed, *regardless* whether the contemporary State court proceedings satisfy the McCarran Amendment. If the Court were to agree, the issue discussed by Movants—and predictably by others in future cases—would be mooted.

4. Returning to the pending motions, we summarize our conclusion. Treating the papers tendered as a submission *amicus curiae* by interested nonparties, we suggest the Court grant leave to file. Although the "Motion to Dismiss," as a formal matter, must be denied, we believe the Court should consider the objection that the State courts lack jurisdiction under the McCarran Amendment. If, contrary to our own primary submission, that issue is deemed critical to the result, we urge the Court to lay the matter to rest by rejecting the challenge.[5] Alternatively, the cases

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[5]We are here focusing only on the question whether the Arizona and Montana State court proceedings qualify as "general stream adjudications." We adhere to what has been said about the inappropriateness of the State forum, on other grounds, for the adjudication of Indian water rights. See U.S. Br. 15-39; U.S. Post-Argument Memo. 9 n.5.